

Book Reviews

Market Power and Its Control Under the Act Against Restraints on Competition

Kirschstein, Friedrich [Marktmacht und ihre Kontrolle nach dem Gesetz gegen Wettbewerbsbeschränkungen] Munich, Wilhelm Goldmann, 1974. 152 pages 18 DM

Reviewed By ROBERT A. RIEGERT

The West German Act Against Restraints on Competition which took effect on January 1, 1958 was passed in a period in which the Federal Republic was recovering after the Second World War. It reflects the establishment of a liberal economic order in West Germany and was influenced by the antitrust law of the United States.

The Act addresses itself to contractual and other restraints on competition. Contractual restraints on competition—cartel contracts—are basically prohibited, but there are important exceptions. Further, certain vertical restrictions, such as exclusive dealing agreements, may be declared void by the cartel authority under certain conditions.

The most important restraints on competition not based on agreements are those where competition is impaired or disturbed by market power. The traditional German emphasis, as well as that of the original version of the law of 1958, was to regulate the behavior of market dominating enterprises rather than to prohibit their formation. This now has been changed. Amendments to the 1958 Act made on August 5, 1973, (by the 2. Aenderungsgesetz) contain strong provisions against the formation of market dominating enterprises and also strengthen the control of the cartel authority over such enterprises.

Friedrich Kirschstein's book is the first to make a thorough investigation of the new amendments. Kirschstein, who is both a lawyer and an economist, is able to draw heavily on his many years of experience as a member of a decisional senate of the cartel authority. His book discusses Sections 22 to 24b of the Act, which deal with market dominating enterprises, and Section 26(2) which prohibits discrimination by market dominating and other specified enterprises.

Section 22, as amended, defines a market dominating enterprise as: 1) one which does not have a competitor, or 2) one which is not exposed to substantial competition, or 3) one which has a paramount position in relation to its com-

petitors. The 1973 amendments introduce a presumption of market domination based upon a specified market share in the following cases: 1) where a single enterprise controls one third or more of the market for a certain type of goods or commercial services, 2) where three or less enterprises have a combined share of one-half or more of the market, or 3) where five or less enterprises have a combined share of two-thirds or more.

Under Section 22(4) and (5) the cartel authority can prohibit abusive practices by market dominating enterprises and can declare agreements to be void. Kirschstein gives many examples of market domination and abusive practices from cartel-authority and court cases. In this context, he discusses the demarcation of the relevant market in considerable detail (p. 26ff. and p. 47ff.).

As a result of the 1973 amendments, the cartel authority is required to prevent a merger if the merger would create or strengthen a market dominating position, unless the participating enterprises prove that the merger will lead to improvements in the conditions of competition which outweigh the disadvantages of market domination (Section 24). Under certain conditions the Federal Minister for Economic Affairs can authorize a merger which has been prohibited by the cartel authority.

Participating enterprises enjoy the option of giving notice to the cartel authority of their intent to merge. Once the cartel authority has received notice, it can only prohibit the merger if it acts within four months (Section 24). Notice of intent to merge must be given if two or more of the merging enterprises, taken individually, had sales of one billion DM or more in the last completed business year.

The provisions of German law concerning market dominating positions and mergers is complex. Kirschstein's book is an excellent guide to their understanding. It is the work of a scholarly German official written in the best continental tradition, and should be helpful to students and experts alike. Appendices contain the relevant provisions of the Act Against Restraints on Competition and an extensive list of relevant literature. The book is valuable both for theoretical-comparative purposes and for use in practical transnational transactions.

Gunboat Diplomacy

James Cable; Praeger Publishers, New York. Washington, for the Institute for Strategic Studies. 1971. 251 pages. Bibliography, Index. \$11.00.

Reviewed By ALWYN V. FREEMAN

This fascinating volume is an indispensable tool for lawyers and historians searching the past for examples of the limited use of naval forces to protect a nation's interests abroad. No work dealing with the history of gunboat diplomacy has been written since 1919. In the 50 year span examined by the author from that time to 1969, over 150 such instances have been recorded, almost half of them involving the use of naval forces by the United States. The author's description of the circumstances relied upon by successive American Presidents in these numerous illustrations helps to restore the sense of perspective which has been badly distorted by an exaggerated construction of Article 2(4) of the United Nations Charter, no less than by efforts in the United States Congress—culminating in the War Powers Act (in this reviewer's opinion one of the most mischievous pieces of legislation ever spawned in the United States)—to undermine certain Presidential prerogatives in this field. If those historical examples had been appropriately weighed by critics of President Ford's action in the *Mayaguez* affair, it is possible that they might have been somewhat less precipitous in their denunciation of a traditional action which was not only consistent with general, customary international law, but squarely grounded on Article 51 of the United Nations Charter.

The book is not merely a compilation of typical gunboat pressures for an objective not otherwise attainable; it is an analytical compendium of such subjects as the basic principles of limited naval force, the impact on those principles of the altered technological environment in which they must be applied, the naval capacities required by these changes, the Soviet naval "enigma" (less of an enigma today than when the author wrote), and modern applications of the principles set forth. Among the many cases which the author chronicles are such familiar instances as Eisenhower's action in Lebanon; Corfu; the Iceland fishing "war"; the *Pueblo* and the controversial *Altmark* case. While one would hardly regard *Altmark*, at first glance, as an application of gunboat "diplomacy" (except, possibly, vis-a-vis the Norwegians), it was an application of the author's concept, which he defines as

the use or threat of limited naval force, otherwise than as an act of war, in order to secure advantage or to avert loss, either in the furtherance of an international dispute or else against foreign nationals within the territory or the jurisdiction of their own state.

The complexities of the decision process required in these various incidents is evidenced by the Cuban missile crisis, where, even on the issue of so critical a magnitude that an obvious assumption existed of the need to protect American interests against a grave threat, it required five days of intensive discussions to reach the decision that limited naval forces would be an appropriate element in the American response (pp. 159-160).

One of the most useful features of the book is an appendix cataloguing 50 years of gunboat diplomacy with a convenient capsule synopsis of some 154 examples of the use of naval force to achieve the limited goals of such actions. In Cable's view, gunboat diplomacy is certainly not over; nor does he think it should be, given the chaotic status of the world community and the ineffective remaining options available to vindicate a nation's rights against lawless and irresponsible actions on the part of some of the less than "peace-loving" members of the family of nations.